

§ 681.26

(a) In which the defendant resides or transacts business; or

(b) In which the claim or statement on which liability is based was made to NSF; or

(c) As agreed upon by the defendant and the ALJ.

§ 681.26 How will the hearing be conducted and who has the burden of proof?

(a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the penalty and/or assessment. The hearing will be recorded and transcribed, and the transcript of testimony, exhibits admitted at the hearing, and all papers filed in the proceeding constitute the record for a decision by the ALJ.

(b) NSF must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

§ 681.27 How is evidence presented at the hearing?

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where he or she deems appropriate.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence shall be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

45 CFR Ch. VI (10–1–10 Edition)

§ 681.28 How is witness testimony presented?

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 681.19.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

(d) The ALJ shall permit the parties to conduct such cross examination as may be required for a full and true disclosure of the facts.

(e) Upon motion of any party, the ALJ shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 681.29 Will the hearing proceedings be recorded?

The hearing will be recorded and transcribed. The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.